Supreme Court, U.S.
FILED
OCT 11 2000
CLERK

(3)

No. 00-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

LOCAL UNION 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

INTERVENOR'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR L. SMITH*
STUART I. COHEN
ROBERT S. SEIGEL
HUSCH & EPPENBERGER, LLC
100 N. Broadway
Suite 1300
St. Louis, Missouri 63102
Phone: (314) 421-4800

Attorneys for Intervenor
Central Illinois Public Service Co.

*Counsel of Record

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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Certificate As To Parties

All parties appearing before the National Labor Relations Board and in this Court are listed in the caption.

Pursuant to FRAP Rule 26.1, Central Illinois Public Service Company ("CIPS") states that it is a subsidiary of Ameren Corporation ("Ameren"), a publicly traded company. No publicly traded company owns more than 10% of the common stock of Ameren. CIPS is engaged in the distribution of electricity and gas. In May 2000, CIPS transferred its electric generation assets to its affiliate, Ameren Energy Generating Company, a wholly owned subsidiary of Ameren.

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Statement Of The Case

Petitioners ("the Unions") represent approximately 1,500 employees of intervenor Central Illinois Public Service Co. ("CIPS"), which is a public utility supplying electricity and natural gas in central and southern Illinois. App. 17a; 70a. In 1992 and 1993, CIPS and the Unions were negotiating a new collective bargaining agreement. In March 1993, CIPS submitted its final proposal to both Unions. *Id.*

The Unions rejected this proposal, but they did not call a strike. The Unions thought that a strike was too risky because of the possibility of permanent replacements. App. 21a. Instead, they decided to implement an "inside game" – an alternative that they thought would be just as effective as a strike but without the risk. *Id.*

The inside game consisted of refusal to work overtime and working strictly to rule. The work to rule tactics included slavish adherence to the exact terms of all company rules; doing exactly and only what they were told; reporting precisely on time; leaving company trucks at the company facilities; and presenting all grievances en masse. App. 18a.

The purpose of the inside game was to put economic pressure on CIPS to accede to the Unions' bargaining position. App. 21a. The AFL-CIO has described the inside game as "a strike that isn't a strike but just looks and feels like a strike" – a tactic that may be "more appropriate and effective" than a strike. Industrial Union Department, AFL-CIO, *The Inside Game: Winning With Workplace Strategies*, at 5, 22 (1986).

As the NLRB found, the inside game – particularly the refusal to work overtime – was "an economic weapon

used in support of the Unions' bargaining position" which "furthered the Unions' interests in contract negotiations." App. 28a-29a. After enduring that pressure for four weeks, CIPS locked out the Unions. On the day of the lockout, CIPS mailed a letter to each member of the Unions.[1] That letter complained about the inside game and the pressure it was bringing on CIPS. It also recounted the history of the bargaining effort and the substantial concessions that CIPS had made. It complained of the Unions' refusal to submit CIPS' modified proposals to the membership for vote. It concluded by stressing CIPS' desire "to bring these issues to a successful conclusion and have you back at your jobs at the earliest possible date." App. 27a.

The NLRB found that the lockout was "in response to" the inside game. App. 21a. Based on the letter, however, it also found that "a purpose of the lockout was to affect the outcome of negotiations." App. 28a. Certainly, the Unions were in no doubt of CIPS' objective. In briefing before the NLRB, they stated that it was "obvious" that the lockout would end if the Unions agreed to CIPS' proposals, and any suggestion to the contrary was both "ridiculous" and "absurd."

The ALJ found that the purpose of the lockout was to "harm or punish" the Unions for engaging in protected conduct. App. 242a. The ALJ also found that CIPS had no valid business purpose for the lockout, based primarily on the ALJ's own views about the alternatives available to CIPS. App. 243a-244a.

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[1] The Unions purport to quote the "relevant" portions of this letter. Pet. at 3 n.2. In fact, they have quoted it just as "selectively" as did the administrative law judge ("ALJ") – a tactic that the NLRB criticized. App. 26a.

The NLRB reversed both findings. It found, as a matter of fact, that CIPS was not motivated by anger at the employees or a desire to punish them. App. 34a. It held, as a matter of law, that an employer could use its own economic weapons in response to a union's use of an economic weapon, such as the inside game, to pressure the employer. App. 25a. The NLRB reasoned that there is no meaningful distinction between a lockout in support of the employer's bargaining position and a lockout in opposition to a strike or an inside game. App. 28a. Under this reasoning, "a lockout in opposition to the inside game is perforce a lockout in opposition to the Unions' bargaining position, and in support of Respondent's bargaining position." App. 30a.

Thus, the NLRB has adopted a policy of strict neutrality when the parties to a collective bargaining relationship deploy their economic weapons. If a union deploys an economic weapon such as the inside game, the employer may respond with its own economic weapons such as a lockout.

Argument

I. The Unions Have Completely Distorted The Holdings Of The NLRB And The Court Of Appeals.

The sole basis on which the Unions seek certiorari is the alleged public importance of the NLRB's decision in this case. According to the Unions, the NLRB has authorized employers to engage in a "retaliatory lockout to harm and punish employees for engaging in protected, concerted activity." Pet. at 10 n.6. They repeatedly characterize the lockout as a "reprisal" against protected, concerted activity. *E.g.*, Pet. at 6; 12; 15-17;

23. These characterizations are the sole basis for the Unions' assertion that the NLRB's holding is "a radical break" with prior law and "a plain misreading of this Court's lockout decisions." Pet. at 10-11.

The Unions can make these characterizations only by distorting the NLRB's actual holding and ignoring its rationale. The NLRB did not hold that CIPS could lock out its employees in order to punish them for engaging in protected activity. It stated that the "question in this case" is whether CIPS could "counter the Unions' economic weapon with an economic bargaining weapon of its own." App. 22a. The NLRB found that the Unions had "commenced economic warfare" by using the inside game as a "weapon" to "secur[e] agreement on their terms." App. 25a. It held that CIPS could "defend against this weapon with a lockout in order to force the Unions to yield." *Id.* In short, the NLRB held that an employer could use its own economic weapons in response to a union's resort to economic weapons.

The holding that parties to the collective bargaining process may deploy their economic weapons free from intrusive oversight by the NLRB is mainstream labor law. Indeed, the NLRB's holding follows this Court's explicit invitation to adopt that precise rule. In *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Com'n*, 427 U.S. 132 (1976), this Court suggested:

> It may be that case-by-case adjudication by the federal Board will ultimately result in the conclusion that some partial strike activities such as the concerted ban on overtime in the instant case . . . are "protected activities" within the meaning of § 7, *although not so protected as to preclude the use of*

> *available countervailing economic weapons by the employer.*

427 U.S. at 152 n.14 (emphasis added).

The NLRB's holding thus leaves the parties to a collective bargaining relationship free to deploy their economic weapons without intrusive NLRB oversight. As the NLRB recognized:

> [T]he tools of economic warfare are so directly related to the substantive bargaining positions of the parties, that undue regulation of the former will inevitably enmesh the Board in an impermissible control of the latter.

App. 29a, *citing American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), and *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

The repeated characterization of the lockout as a "reprisal" against protected activity is pure semantics. The NLRB opinion uses that word once, quoting the ALJ's findings. App. 19a. The NLRB itself held only that the lockout was "in response to" the inside game. App. 21a. It expressly:

> reject[ed] the judge's findings that the Respondent was really inspired by "anger" against employees for engaging in their protected inside game activities and that the lockout was a way to "punish" them.

App. 34a. Thus, the NLRB expressly rejected the Unions' suggestion that the lockout rested on animus toward the Unions, instead of a response to the inside game.

Because the Unions were using the inside game as an economic weapon to force CIPS to accede to their bargaining position, CIPS was entitled to respond with its own economic weapons. As the Board reasonably concluded:

> Respondent's lockout was simply its economic weapon in response to the Unions' economic weapon. Thus, the lockout was both a weapon in support of the Respondent's bargaining position and a weapon in opposition to the Unions' weapon which was used in support of the Unions' bargaining position.
>
> .... [I]t makes little sense to say that the lockout was caused by the inside game strategy rather than by the respective bargaining positions of the parties. The truth is that the two are inextricably tied in this case.

App. 28a-29a.

The NLRB has "considerable authority" to interpret the labor laws. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987), and the courts defer to its rulings so long as they are "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). Under this deferential standard, it is for the NLRB – not the courts – to "strike the proper balance between the asserted business justifications and the invasion of employee rights." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983). *Accord, NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963).

The NLRB's actual holding is well within the NLRB's broad discretion. This Petition presents no important question of federal law requiring this Court's review.

II. The NLRB's Holding Is Consistent With, If Not Compelled By, This Court's Precedents.

Since its decision in *American Ship*, this Court has directed the NLRB to take a strict "hands off" approach to the use of economic weapons by either party. Before *American Ship*, the NLRB did prohibit lockouts to improve the employer's bargaining position. Its rationale for doing so was exactly what the Unions now urge:

> In the Board's view, the use of the lockout "punishes" employees for the presentation of and adherence to demands made by their bargaining representatives and so coerces them in the exercise of their right to bargain collectively.

380 U.S. at 308.

American Ship rejected both the NLRB's rule and its rationale. This Court held that there was no § 8(a)(1) violation because the "use of a lockout solely in support of a legitimate bargaining position" was in no way "inconsistent with the right to bargain collectively." 380 U.S. at 310. There was no § 8(a)(3) violation, because the employer's intention was "merely to bring about a settlement of a labor dispute on favorable terms." 380 U.S. at 313:

> The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collec tively does not entail any "right" to insist on one's position free from economic disadvantage.

380 U.S. at 309. The NLRB explicitly relied on this part of *American Ship* in its decision in the instant case. App. 25a.

In *NLRB v. Brown*, 380 U.S. 278 (1965) (*Brown Food*), this Court extended the principle to a lockout designed to preserve the employers' bargaining power, rather than to advance any particular proposal. The union struck one of the five employers in a multi-employer bargaining unit. The other four locked out their employees, hired temporary replacements, and informed the employees "that they would be recalled to work when the strike . . . ended." 380 U.S. at 281.

The NLRB held that this was unlawful, because the lockout and temporary replacements inhibited a lawful strike. This Court disagreed:

> In the absence of proof of unlawful motivation, there are many economic weapons which an employer may use that either interfere in some measure with concerted employee activities, or which are in some degree discriminatory and discourage union membership, and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or § 8(a)(3).

380 U.S. at 283.

Brown Food clearly supports, and probably requires, the NLRB's decision in the instant case. The employers in *Brown Food* did not condition the end of the lockout on the achievement of a collective bargaining agreement. They conditioned it on an end to the strike – an activity "no less protected than the inside game" in the instant case. App. 25a. If an employer can condition the end of a lockout on ending a strike, a lockout designed to "force the Unions to cease their inside game" must be lawful. App. 25a.

Brown Food allowed all members of a multi-employer group to lock out the union in response to a whipsaw strike against one of the employers. 380 U.S. at 281. The same principle would permit a single employer with multiple facilities to lock out all of its employees in response to a strike directed to a single facility. In the instant case, the Unions effectively struck every time they implemented one of the inside game tactics – *e.g.*, refusing overtime. A lockout of all employees in response to such a strike is identical in principle to locking out all employees in response to a strike at a single facility. *Brown Food* is compelling precedent for the NLRB's decision in the instant case.

In *Machinists*, the union engaged in a concerted refusal to work overtime, in order to put economic pressure on the employer. A state labor relations board found that this practice violated state law and enjoined it. The issue before this Court was whether federal labor law preempted the state law. This Court held that state law was preempted, because Congress intended that the parties' economic weapons "were not to be regulable by States any more than by the NLRB." 427 U.S. at 149.

Machinists explicitly overruled *Automobile Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949) (*Briggs-Stratton*). 427 U.S. at 154. The reason was that *Briggs-Stratton* had assumed that the employer could not resort to its own economic weapons in response to inside game tactics such as a concerted refusal to work overtime – an assumption that was wrong:

> [E]ven were the activity presented in the instant case "protected" activity within the meaning of § 7, economic weapons were available to counter the Union's refusal to work overtime, e.g., a lockout ....

427 U.S. at 152-53. As noted, *Machinists* invited the NLRB to adopt the very holding that it reached in the instant case: the inside game may be protected activity, but "not so protected as to preclude the use of available countervailing economic weapons by the employer." 427 U.S. at 152 n.14.

The foregoing quotations may be dicta, in that they are not absolutely essential to the preemption holding. As the central reason for overruling a prior precedent of this Court, however, these remarks are "'an important part of the Court's rationale for the result it reache[d],'" and thus "'entitled to greater weight.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996), *quoting Sheet Metal Workers v. EEOC*, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring). As the NLRB stated, App. 31a n.19, it does find Supreme Court dicta "instructive" in interpreting federal labor law – a reasoned conclusion that is itself entitled to deference.

Allowing the employer to meet force with force is the only way to comply with this Court's holding that the NLRB is not the "arbiter of the sort of economic weapons the parties can use" in collective bargaining negotiations. *Insurance Agents*, *supra*, 361 U.S. at 497. Obviously, the lockout puts additional pressure on the union to end the inside game or accept the employer's proposals. Just as in *Brown Food*, "these effects are no different from those that result from the legitimate use of any economic weapon by an employer." 380 U.S. at 286.

By contrast, the Unions want to have their cake and eat it too. Their position is that they can deploy the inside game as an economic weapon but the employer cannot respond with its own economic weapons. As the

NLRB found, App. 21a, the Unions chose the inside game precisely because they thought it was "as effective as the strike but without the risk." In the long run, allowing a union to tilt the playing field like that will produce more disputes rather than fewer:

> [B]oth employers and employees should have the unrestrained opportunity to exert or threaten economic pressure upon each other. To the extent this opportunity is limited, the parties have less to lose by intransigence and are less likely to make concessions for settlement.

Note, 85 *Harv. L. Rev.* 680, 685-86 (1972).

The Unions claim that *American Ship* is limited to temporary layoffs "*solely* as a means to bring economic pressure" in support of the employer's bargaining position. Pet. at 21 (emphasis by the Unions). They claim that the instant case involves "a desire to retaliate for protected, concerted activity" for the purpose of "forcing the employees to end that activity." *Id.*

This theory entirely ignores the NLRB's holding that there is no meaningful distinction between a lockout in support of the employer's bargaining position and a lockout in response to the inside game:

> [T]he inside game continued to be a weapon to achieve the Unions' bargaining position. That bargaining position was contrary to the Respondent's bargaining position. It would seem to follow that a lockout in opposition to the inside game is perforce a lockout in opposition to the Unions' bargaining position, and in support of Respondent's bargaining position.

App. 29a-30a.

The Unions claim that *American Ship* allows lockouts only to support the employer's bargaining position – not those that are hostile to the bargaining process. Pet. at 21-22. Because the lockout was an economic weapon deployed in response to the Unions' own economic weapon, it was inherently supportive of the bargaining process. In briefing before the NLRB, Local 702 acknowledged that CIPS would have instantly terminated the lockout if the Union gave in to CIPS' bargaining position, and it derided any suggestion to the contrary as "absurd" and "ridiculous."

The Unions' discussion of *Brown Food* is pure semantics. They seize on the word "reprisal," which the NLRB quoted from the ALJ's decision, and argue that *Brown Food* involved no evidence of reprisal. Pet. at 22-23. The word "reprisal" can have two meanings. It can mean hostility to the Unions and a desire to punish them, which would convert an otherwise legal lockout into an unfair labor practice; the NLRB rejected that theory on the facts. App. 34a. Alternatively, the word can mean "in response to," and that is clearly what the NLRB meant to find: that CIPS had used the lockout "in response to" the inside game. App. 21a.

The Unions assert that *Brown Food* "did *not* sanction lockouts 'responsive' to whipsaw strikes." Pet. at 23 (emphasis original). The Unions are simply wrong. In *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957) (*Buffalo Linen*), the employers told the union that the lockout was "because of the Frontier strike," and would end if the union "ended the strike." 353 U.S. at 90. This Court nonetheless held that the lockout was lawful. In *Brown Food*, this Court described its holding in *Buffalo Linen*:

> [I]n the absence of specific proof of unlawful motivation, the use of a lockout by members of a multiemployer bargaining unit *in response to* a whipsaw strike did not violate either § 8(a)(1) or § 8(a)(3).

380 U.S. at 281-82 (emphasis added).

At bottom, this petition rests on the theory that a lockout in response to the inside game in and of itself establishes unlawful motivation. *Buffalo Linen* implicitly and *Brown Food* explicitly reject that theory. That is why *Machinists* plainly states that a lockout is a lawful, legitimate response to a union's use of economic weapons such as the inside game. The NLRB's opinion is consistent with, if not compelled by this Court's precedents.

III. The NLRB's Holding Is Consistent With, If Not Compelled By, Its Own Precedents.

The Unions claim that a "long and unbroken line" of NLRB precedents holds that retaliation against protected activities is an unfair labor practice. Pet. at 14. They assert that the purpose of this lockout was to retaliate against the Unions for using the inside game and claim that "lockouts in reprisal for employees' concerted, protected activities" are unfair labor practices. Pet. at 15.

There are two fundamental flaws in these grandiose assertions. First, the Unions assume that a lockout in response to the use of an economic weapon by a union, standing alone, is unlawful retaliation. As noted, this Court's precedents hold exactly the opposite. Second, the Unions assume that there is some meaningful distinction between a lockout in support of an employer's

bargaining position and a lockout in opposition to a union's deployment of economic weapons. They never address the NLRB's holding that these are merely two sides of the same coin.

Thus, it is unsurprising that none of the Unions' lockout cases support their theory.[2] In *Highland Superstores*, 314 NLRB 146 (1994), the employer announced its intention to subcontract some unit work. The union issued handbills urging a consumer boycott of Highland. Highland then threatened to terminate any employee who distributed a handbill.

The NLRB regarded the handbilling as an "economic action by the union." 314 NLRB at 146. It held that "an employer can ordinarily take economic action" in response to the union's economic action in support of a lawful bargaining position. *Id.* Based on "the specific facts of this case," the NLRB found that the employer had acted "to punish the employees for their handbilling, rather than in support of its bargaining position." *Id.* Those "specific facts" were that the employer's conduct:

> was a threat to terminate, not simply a threat to lockout. In addition, the Respondent did not explain, until the hearing, that its lockout was in support of its bargaining position.

Id.

In the instant case, CIPS never threatened to terminate anyone and the Unions knew at all times that the lockout would end if they capitulated. App. 32a. The NLRB specifically "rejected[ed]" the ALJ's findings that

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[2] Most of the Unions' "long and unbroken line" of cases, Pet. at 14-15, have nothing to do with lockouts.

the purpose of the lockout was "to 'punish'" the employees. App. 34a. Given the NLRB's factual findings in the instant case about CIPS' motives, *Highland Stores* requires application of the ordinary rule that "an employer can . . . take economic action" in response to the Unions' economic action. 314 NLRB at 146.

In *Riverside Cement Co.*, 296 NLRB 840 (1989), the employer implemented its final offer, which included several articles taken directly from the expired agreement. The custom and usage of the parties under one such article gave the employees discretion on whether to bring their own hand tools. The employer demanded that the employees provide their own hand tools and denied work to those who did not. For two reasons, the NLRB rejected the employer's argument that this was a lawful lockout.

First, the "denial of work was limited to only those employees" who refused to supply their own hand tools. 296 NLRB at 842. As the Court of Appeals observed in the instant case, the lockout was unit-wide. App. 12a. That distinction is critical. Section 8(a)(3) prohibits "discrimination against employees who participate in concerted activities protected by § 7." *Metropolitan Edison, supra*, 460 U.S. at 703. Locking out only those employees who engage in protected activities would penalize only those who actively support the union. In every case in which this Court has found conduct to be inherently destructive of unit members' rights, "the employer treated employees *within* a bargaining unit differently depending upon the degree of their union activity." *Int'l Paper v. NLRB*, 115 F.3d 1045, 1050 (D.C. Cir. 1997) (emphasis original).

Moreover, allowing an employer to suspend only the union activists would not inflict enough pain on the employer who attempts it. The economic weapons that the parties can use serve the goal of collective bargaining, because they hurt the party that invokes them as well as the other party. For example, a strike may pressure the employer, but the unit members have to do without a paycheck for its duration. An employer who locks out its workers is "unlikely [to] ... fare well" using inexperienced replacements, because the business "will operate less efficiently." *Int'l Brotherhood of Boilermakers v. NLRB*, 858 F.2d 756, 767 (D.C. Cir. 1988). If the employer could lock out only the union activists, while retaining the other experienced employees, this disadvantage would vanish. Thus, it is reasonable to distinguish between suspensions of only the activists and lockouts of everyone.[3]

The NLRB's second rationale in *Riverside* was that the employer had not acted "to support a legitimate bargaining position." 296 NLRB at 842. Rather, its action was "contrary to . . . the relevant condition of employment." *Id.* n.10. Thus, as the NLRB found, App. 33a n.20, the employer had unilaterally changed the terms of its own implemented final offer. By definition, a lockout in support of an unlawful bargaining position is itself unlawful, and the NLRB properly distinguished *Riverside* on that basis. App. 33a n.20.

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[3] The Unions' suggestion that this distinction "explains nothing and justifies nothing," Pet. at 19, ignores the unique context of lockouts in support of an employer's bargaining position. None of the Unions' cases arise in that context, so none are in point.

The Unions' final lockout authority is *Thrift Drug Co.*, 204 NLRB 41 (1973), *enforced*, 491 F.2d 751 (3d Cir. 1974). They quote a portion of the ALJ's opinion to the effect that suspension of a single union activist was illegal because its primary purpose was to protect the employer against the union's economic weapons, rather than to support the employer's bargaining position. Pet. at 16. The NLRB did not adopt that portion of the ALJ's opinion.

The ALJ apparently found the employer's conduct illegal for three independent reasons:

A. The purpose of the lockout was to protect the employer "against the Union's economic weapons," rather than to place "an economic burden on the union members in support of the Employer's contract position."

B. The "selection of Mrs. Peterson because of her activities on the picket line was discriminatory."

C. Continuing operations with the other employees violated *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971).

204 NLRB at 43.

In affirming, the majority of the NLRB adopted only the second of these rationales. "Members Kennedy and Penello rely ***solely*** on [the] finding that Peterson was unlawfully selected for suspension because of her activities on behalf of the Union." 204 NLRB at 41 n. 2 (emphasis added). Member Jenkins also relied on the *Inland Trucking* theory. *Id.* No one endorsed the first

theory, and no subsequent authority has ever relied on it. The NLRB does not treat unexcepted findings of an ALJ as precedent. *Carpenters Local 370 (Eastern Contractors Assn, Inc.)*, 332 NLRB No. 25, at 2 n.2 (2000). An ALJ opinion that the NLRB does not adopt cannot be valid precedent either. II Davis & Pierce, *Administrative Law Treatise*, § 9.9 at 97 (3d Ed. 1994) ("The agency adopts an ALJ's decision only if, and to the extent that, it agrees with the decision").

Consistent with this Court's precedents, the NLRB has adopted a general rule that an employer may deploy its own economic weapons in response to a union's resort to economic weapons. That does not discriminate against the union. Instead, it creates a level playing field in which both sides are free to use their economic weapons without intrusive oversight by the NLRB.

Conclusion

For these reasons, the petition for certiorari should be denied.

Respectfully Submitted,
HUSCH & EPPENBERGER, LLC
By:
Arthur L. Smith
Counsel of Record
Stuart I. Cohen
Robert S. Seigel
100 North Broadway, Suite 1300
St. Louis, MO 63102
Office: (314) 421-4800
Fax No: (314) 421-0239

Attorneys for Intervenor
Central Illinois Public Service Co.